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in the
Supreme Court
of the
United States

OCTOBER TERM 1970

No. 1674

APOSTOLOS SAMADJOPOULOS,
Petitioner,

vs.

NATIONAL WESTERN LIFE INSURANCE COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

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BRIEF FOR RESPONDENT IN OPPOSITION

QUESTIONS PRESENTED

Respondent has restated and restructured the questions presented by petitioner in order to present in an orderly fashion its argument that the petition should be denied.

I. DOES THE SHIP MORTGAGE ACT GOVERN THE PRIORITIES OF MARITIME LIENS IN THE FORECLOSURE OF A FOREIGN PREFERRED MORTGAGE?

A. THE SHIP MORTGAGE ACT IS CLEAR AND UNAMBIGUOUS.

B. THERE IS NO CONFLICT WITH OTHER DECISIONS.

C. THERE IS NO CONFLICT BETWEEN THE DECISION AND THE TREATY WITH LIBERIA.

II. IS RULE 6 OF THE RULES OF THE COURT OF APPEALS FOR THE FIRST CIRCUIT A VALID EXERCISE OF THE COURT'S DISCRETIONARY POWERS AND CONSISTENT WITH RULE 40 OF THE FEDERAL RULES OF APPELLATE PROCEDURE?

STATEMENT

Issue is taken with Petitioner's statement that "the validity of the claims or the amounts involved were not disputed" (p. 5)[1] by the mortgagee (Respondent). In fact, the mortgagee questioned the master's claims as a matter of law throughout the District Court proceedings including opposition to the master's leave to intervene and a

[1]Page references are to Petitioner's brief and appendix.

petition for rehearing and for reconsideration of the District Court's final judgment. The master's claims were based on records he himself prepared, so the mortgagee defended on the basis of the law and by cross examination of the master.

The remainder of Petitioner's Statement is not objected to.

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

I. THE SHIP MORTGAGE ACT GOVERNS THE PRIORITIES OF MARITIME LIENS IN THE FORECLOSURE OF A FOREIGN PREFERRED MORTGAGE.

A. THE SHIP MORTGAGE ACT IS CLEAR AND UNAMBIGUOUS.

The Ship Mortgage Act, 46 U.S.C. §§951-954, (the Act herein) by its 1954 amendment, provides that the term "preferred mortgage" shall include any mortgage on a foreign vessel if certain requirements are met. Petitioner has not questioned the District Court's finding that the mortgage in this case met these requirements and is covered by 46 U.S.C. Sec. 951 of the Act. The priority of various maritime liens in relation to a "preferred mortgage" is contained in 46 U.S.C. Sec. 951 and Sec. 953. Petitioner does not contend that the Act should not apply to this case. Rather, his contention is that the application of this law by the Court of Appeals conflicts with the Congressional intent in enacting the legislation.

Petitioner has failed to cite any evidence of legislative intent that is contrary to the decision of the Court of Appeals. Petitioner contends that the Act merely provides a forum in which to foreclose a foreign mortgage, but does not give the mortgage lien any priority over other maritime liens. The House Report[2] on this section of the Act states:

> " . . . the bill improves the position of the holder of a mortgage on a foreign vessel, for under existing United States law he may only foreclose in an equity proceeding in the United States Court and in such case the mortgage lien is subordinate to all maritime liens." (H. Rep. 1662, 83rd Cong. 2d Sess., p. 3; United States Code and Administrative News, Vol. II 1954 p. 2453)

Continuing the thought expressed above, the "improved position" of the mortgagee is that he is no longer "subordinate to all maritime liens," and therefore he must have priority over those liens not given priority by the Act. The House Report continues:

> "There appears to be no reason to include within the operation of the proviso liens arising from repairs and supplies furnished outside the United States, and thereby give a foreign repairman a priority which even under the laws of his own country might not be accorded him." (H. Rep. 1662, 83rd Cong. 2d Sess., p. 3; United States Code and Administrative News, Vol. II 1954 p. 2453).

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[2]The House bill passed in lieu of the Senate bill and the House Report is more comprehensive than the Senate Report.

Petitioner's contention that Congress did not intend for the Act to cause certain lien claimants to have a priority lower than a "preferred mortgage" is clearly erroneous.

Petitioner contends that the Act does not spell out the relative order of priorities in the case of a foreign mortgage. The applicable portions of the Act are reprinted at pages 69-71 of the Petition. The Act is so clear and unambiguous as not to admit of construction. The device used by the amendment to the Act to include foreign mortgages is to specifically include them in the term "preferred mortgage." Once included in this category of a "preferred mortgage," the remaining sections of the Act must apply to the foreign mortgage, thus providing the relative order of priorities applicable to this case.

B. THERE IS NO CONFLICT WITH OTHER DECISIONS.

Petitioner contends that the case at bar is in conflict with "decisions of this court and other Admiralty courts." The only conflict petitioner can point to is that the Court of Appeals applied United States law in this case, while the law of the flag has often been applied in prior cases dealing with *different* causes of action.

There have been two prior appellate decisions in which the question of priority between a foreign "preferred mortgage" and a traditional maritime lien has been directly before the courts. In *Brandon* v. *Denton*, 302 F.2d 404, 1962 A.M.C. 1730 (5th Cir. 1962), the court held that the lien of the mortgage had priority over the lien for fuel supplied to the vessel in Italy, despite the fact that under

Italian law the fuel lien had priority over the mortgage. In *Barnouw* v. *S.S. Ozark*, 304 F.2d 717 (5th Cir. 1962) cert.den. 371 U.S. 923, 83 S.Ct. 291, 9 L.Ed.2d 231, the court followed *Brandon, supra*, and held that the lien of a foreign "preferred mortgage" was superior to a traditional maritime lien established under Italian law for bunkers supplied to the vessel. In both cases, the priority of the liens was determined pursuant to the terms of the Act.

There is excellent precedent to support the decisions of the Courts of Appeal in *Brandon, Barnouw* and the case at bar. In *Harrison* v. *Sterry, 5 Cranch* 289, 298, 9 U.S. 289, 298, 3 L.Ed. 104 (1809) this court held that:

> " . . . the right of priority . . . is . . . dependent on the law of the place where the property lies and where the Court sits which is to decide the cause."

In *The Scotia*, 35 F. 907, 910-11 (S.D.N.Y. 1888), it was held

> "Liens and privileges, when enforced in other countries than in those by whose laws they are created, are largely treated as remedies, and unless affecting foreigners alone, take rank according to the law of the forum."

And in one of the first cases to be decided under the Act, the court ruled that the question of priorities between a "preferred mortgage" and other maritime liens must be determined by the law of the United States, and that the Act supplied the relative lien priorities. *The Oconee*, 280 F.927 (E.D. Va. 1922). Clearly, all the reported cases

construing the Act support the decision of the Court of Appeals in the case at bar.

Petitioner appears to place his hope of establishing a conflict in this Court's decision in *Lauritzen* v. *Larsen*, 345 U.S. 571, 73 S.Ct. 921, 97 L.Ed. 1254 (1953). In *Lauritzen*, a Jones Act case, having nothing to do with maritime liens or their relative priorities, this Court discussed the various choices of law available and concluded that the law of the flag should govern the facts as established in that particular case. *Lauritzen* is an excellent authority for the proposition that the law of the flag should not automatically be applied in admiralty cases.

There is a vital distinction between the facts in *Lauritzen* and the present case. A reason given in *Lauritzen* for not applying the law of the forum was that the defendant shipowner was not in court voluntarily. This court stated:

> "Because a law of the forum is applied to plaintiffs who voluntarily submit themselves to it is no argument for imposing the law of the forum upon those who do not." 345 U.S. at 592.

In the case at bar, both petitioner and respondent were intervenors. Therefore they both voluntarily submitted themselves to the United States courts. Not only did the petitioner submit his claims voluntarily to the United States District Court, but one of his claims was for double wages pursuant to 46 U.S.C. Sec. 596. Therefore, the petitioner has taken inconsistent positions, invoking United States law in his claim for double wages and invoking Liberian law in seeking a lien for the wages of a master. And yet both claims grew out of the same transaction!

C. THERE IS NO CONFLICT BETWEEN THE DECISION AND THE TREATY WITH LIBERIA.

The alleged conflict with Article XIV of the Treaty of Friendship, Commerce and Navigation between the United States and Liberia has no basis since the master of an American flag vessel in 1967 would not have been entitled to a maritime lien for wages either. 46 U.S.C. Sec. 606, enacted in April, 1968, now gives a master the same lien for wages as a seaman. The legislative history of Sec. 606 stated that the statute was enacted to change the existing law which had uniformly denied the master a lien for wages. United States Code and Administrative News, Vol. II 1968- 90th Congress, Second Session, pp. 1889-90. In any event, there is no conflict between the decision of the Court of Appeals and the treaty with Liberia since the master in this case received the "same treatment" as to his wage claim as the master of an American vessel would have received in 1967.

In *Brandon* v. *Denton, supra*, an Italian lienor claimed that a similar treaty between the United States and Italy was in conflict with the 1954 amendment to the Ship's Mortgage Act. Justice Rives of the Fifth Circuit, in a case where there may have been some conflict between the treaty and the Act, cited *Tag* v. *Rogers*, 105 U.S. App. D.C. 387, 267 F.2d 664, 668 (1959), for the proposition that

> "Once a policy has been declared in a treaty or statute, it is the duty of the federal courts to accept as law the latest expression of policy made by the constitutionally authorized policy-making authority."

The Liberian treaty became effective in 1939, the amended Ship's Mortgage Act in 1954.

The case at bar is stronger in favor of respondent than *Brandon* v. *Denton* because here there is no conflict between the statute and the treaty.

II. RULE 6 OF THE RULES OF THE COURT OF APPEALS FOR THE FIRST CIRCUIT IS A VALID EXERCISE OF THE COURT'S DISCRETIONARY POWERS AND IS NOT INCONSISTENT WITH RULE 40 OF THE FEDERAL RULES OF APPELLATE PROCEDURE.

Rule 40(a) of the Federal Rules of Appellate Procedure allows a party dissatisfied with an opinion of the Court of Appeals to petition that court for rehearing. A rehearing is not a matter of right but is a question addressed to the sound discretion of the court. *Chapman* v. *Federal Land Bank*, 117 F.2d 321 (6th Cir. 1941); *Hooper* v. *Beecher*, 109 N.Y. 609, 15 N.E. 742 (1888); *Stevens* v. *Myers*, 91 Or. 114, 117 P. 37, 2 A.L.R. 1155 (1918); *Bridges* v. *United States*, 201 F.2d 254, 255 (9th Cir. 1952). Since the Court of Appeals has the discretion to grant or deny the petition, it should have the right to advise parties in advance of the basis upon which a petition for a rehearing will be considered.

Rule 47 of the Federal Rules of Appellate Procedure provides the authority for each circuit to regulate practice before it, provided such rules are not inconsistent with the Federal Rules. Petitioner contends that Rule 6 of the First

Circuit, which requires an introductory statement that the argument or matter was not presented before and why it was not, is in conflict with Rule 40(a) of the Federal Rules. Rule 40(a) does not give a party the right to a rehearing. Rather it merely sets forth conditions upon which a request for rehearing may be made.

An appellate court may adopt reasonable rules regulating the right to a rehearing. *Herndon* v. *Imperial F. Ins. Co.*, 111 N.C. 384, 16 S.E. 465 (1892); *Atlantic Greyhound Corp.* v. *Public Service Co.*, 132 W.Va. 650, 54 S.E.2d 169, 175 (1949). Petitions for rehearing

> "are to be filed only in unusual circumstances. In the absence of clear error they are not to be used to reargue matters already argued and determined . . . (nor) for the purpose of presenting matters which should have been, but without good cause, were not argued before . . ." *Local No. 1505 International Brotherhood of Electrical Workers* v. *Local Lodge No. 1836*, 304 F.2d 365, 367-8 (1st Cir. 1962) reh. den. 1962.

Rule 6 of the First Circuit is very similar to Rule 58(2) of the Rules of the Supreme Court, which limits petitions for rehearing on writs of certiorari to "grounds . . . confined to intervening circumstances of substantial or controlling effect or to other substantial grounds available to petitioner although not previously presented."

Therefore, Rule 6 of the First Circuit is not in conflict with Rule 40(a) of the Federal Rules of Appellate Procedure since it merely sets forth an established policy of the Federal courts that has always been within the discretionary powers of the courts.

CONCLUSION

The decision of the Court of Appeals is clearly in harmony with the previous cases, applicable statutes and treaties; and the decision being clearly correct, there is no basis pursuant to Rule 19 of the Rules of the Supreme Court for the issuance of a writ of certiorari. For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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